No. 20472

IN THE

United States Court of Appeals

For the Ninth Circuit

RUSSELL L. IRISH, dba
RUSSELL L. IRISH INVESTMENTS
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION
Respondent.

PETITION FOR REHEARING

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TO THE HONORABLE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

The Petitioner herein respectfully prays for a rehearing en banc and a reversal of the decision of this Court of October 19th, 1966, Cause No. 20472, ... Fed (2d) ..... affirming an

order of the Securities and Exchange Commission revoking the registration as a broker and dealer in securities of Russell L. Irish, expelling him from Membership in the National Association of Securities Dealers, Inc., and naming Russell Lawson Irish, Mr. Irish's son whom he employs as a salesman, as a cause of the revocation and explusion. This Court's decision has terminated the Petitioner's right to employment, and has ended his career, upon a cold and distant record, upon charges of willful violations of anti-fraud provisions of The Securities Act, where the Hearing Examiner, who held four days of hearings in 1959, held in his written Recommended Decision of April 13, 1964, some four years later, that he could not pass upon credibility of the various witnesses (Recommended Decision, page 8), and further that it was the Hearing Examiner's opinion, during the four days of live testimony in 1959, that the Commission's case was very weak, and that it was not in the public interest to require the revocation of Mr. Irish's registration on a record that has become as stale as this.

FIRST

This action of the Commission is a death sentence of a quasi-criminal proceeding, where credibility is of outright necessity in order for any court or examiner to find the required evil intent. The examiner, who at least had held the hearing and had seen the witnesses, could not make any finding of credibility of the trial-hearing witnesses which had taken place four

years prior. Certainly to prove willfullness to violate the law, credibility is the vital issue.

The findings of the examiner, like a District Court, cannot be overturned by the Court of Appeals unless the findings are clearly erroneous, and must be reinstated by this Court on appeal unless clearly wrong. In making this examination the Court of Appeals can look only to evidence most favorable to the District Court's (Hearing Examiner's) findings. *Lewis Maeh Co. v. Aztec Lines*, 172 F.2d 746, and in determining whether a trial court's findings are clearly erroneous, due regard must be given to a trial court's opportunity to observe witnesses and judge their credibility. *Kalo Inoculant Co. v. Funk Bros. Seed Co.*, 161 F.2d 981, reversed 333 U.S. 127, 92 L.Ed. 588.

The rule that fact findings shall not be set aside unless clearly erroneous, and that master's findings shall be considered as findings of the court, should be followed in all cases, but particularly where there is a great volume of highly conflicting testimony, and the master who had *advantage of seeing and hearing witnesses is a highly trained lawyer of wide experience.* (Emphasis supplied).

Stonega Coke & Coal Co. v. Price,, 106 F.2d 411, 84 L.Ed. 516

Certiorari denied 308 U.S. 618:

". . . whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they "must be treated

> as unassailable." *Davis v. Schwartz*, 155 U.S. 631, 636, 15 S.Ct. 237, 39 L.Ed. 289; *Adamson v. Gilliland*, 242 U.S. 350, 353, 37 S.Ct. 169, 61 L.Ed. 356; *Alabama Power Co. v. Ickes*, 302 U.S. 464, 477, 58 S.Ct. 300, 82 L.Ed. 374. The reason for this is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds. *Morris Plan Industrial Bank v. Henderson*, 2 Cir., 131 F.2d 975, 977."

Certainly the Commission, if fairness is the rule, must give the same credit to the findings of the examiner of this cause, or Petitioner's rights secured under the Fourth Amendment will be clearly abridged, and held to be of little value. Federal Rules Civil Procedure, Rule 52 (a) 28 U.S.C.A. spell it out insofar as trial court's findings are reviewable by a Circuit Court.

CONCLUSION

For the foregoing reasons, we request a rehearing be held or that judgment be reversed.

Respectfully submitted,

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CERTIFICATE

WE, GRANT L. KIMER and RINER E. DEGLOW, Counsel of Record for Petitioner, hereby certify that in our judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

Dated this 14th day of November, 1966.

Grant L. Kimer

Riner E. Deglow

Attorneys for Petitioner.